BAIL SLIP

The 1st Appellant/Accused NO. 1 viz., Ashok Kumar in SC NO. 87/2002 on the file of Principal Sessions Judge, Erode was directed to be released on bail by the order of this Court dated 30.06.04 and made in CRL MP NO. 5595/04 in CRL A NO. 645/04.

The 2nd Appellant/Accused NO. 4 viz Aalis @ Aarisai in SC NO. 87/02 on the file of Principal Sessions Judge, Erode was directed to be released on bail by the order of this Court dated 17.10.05 and made in CRL MP NO. 7823/05 in CRL A NO. 645/04.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 25-10-2006

CORAM

THE HONOURABLE MR.JUSTICE R.BALASUBRAMANIAN
AND
THE HONOURABLE MR.JUSTICE M.CHOCKALINGAM

C.A.Nos.634 and 645 of 2004

Mani .. Appellant in
C.A.No.634/2004/Accused No. 6)

1.Ashok Kumar
2.Aalis @ Aarisai .. Appellants in
C.A.645/2004/Accused Nos 1and 4)

vs

The State rep by
The Inspector of Police
Erode Town Police Station
Erode District
(Crime No.1292 of 1993) .. Respondent in
both appeals/Complainant

Criminal appeals preferred under Sec.374 of the Code of Criminal Procedure against the judgment of the Principal Sessions Judge, Erode Division at Erode, made in S.C.No.87 of 2002 dated 29.3.2004.

For Appellant : Mr.V.K.Muthusamy,
Senior Counsel
for Mr.M.M.Sundresh
in CA 634/2004

For Appellant No. 1 Mr.S.Ashokkumar
Senior Counsel
for Mr.U.M.Ravichandran

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and Mr.N.G.Parthiban
in CA 645/2004

For Appellant No. 2 — Mr.C.S.Dhanasekaran
in CA 645/2004

For Respondent : Mr.N.R.Elango
A.P.P. in both C.As.

COMMON JUDGMENT

(Judgment of this Court was delivered by M.CHOCKALINGAM, J.)

This judgment shall govern these two appeals in C.A.Nos.634 and 645 of 2004. The first one is brought by A-6, while the second one is brought by A-1 and A-4.

2.These appeals have arisen from the judgment of the learned Principal Sessions Judge, Erode Division, in S.C.No.87 of 2002 whereby seven accused stood charged, and one was found absconding. Out of these seven accused, A-2 and A-3 died after the charges were framed. Thus, the charges became abated in their regard, and the trial went on as against A-1, A-4, A-5, A-6 and A-7, out of whom A-1, A-4 and A-6 were found guilty and awarded punishment as detailed below, while A-5 and A-7 were acquitted of all the charges.

CHARGES:
I. A-1 to A-7 - Under Sections 148 and 341 of I.P.C.
II. A-1 and A-4 to A-7 - Under Sections 302 read with 149 and 307 read with 149 of I.P.C.
CONVICTION AND SENTENCE:
A-1, A-4 and A-6 - Under Sections 148, 341, 302 read with 149 and 307 read with 149 of I.P.C. - 2 years Rigorous Imprisonment, 1 month Simple Imprisonment, life imprisonment with a fine of Rs.5,000/- and default sentence, and 10 years Rigorous Imprisonment with a fine of Rs.2,000/- and default sentence respectively.

3.The short facts necessary for the disposal of these appeals can be stated thus:

(a) P.W.2 is the elder brother of the deceased Christian. They are the residents of Alagappapuram, Kanyakumari District. In the year 1993, there arose a quarrel between the deceased and one Udhayakumar, the brother of A-1, in which the deceased Christian, stabbed Udhayakumar. Following the same, a case came to be registered by Anjugiramam Police Station against the deceased Christian, and the investigation was on. On arrest, he moved for bail, and bail was granted on condition that he should

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report before the Town Police Station, Erode. He was following the conditions from that time. P.Ws.1 to 3 also accompanied the deceased, and all were staying in Poorna Lodge at Erode. While they were staying so, on 20.6.1993 at about 9.30 P.M., they went for taking food, and they were coming back. While the deceased accompanied by P.Ws.1 to 3, was coming nearby the lodge after taking food, they were surrounded by eight persons, who were accused in this case. All were armed with deadly weapons. At that time, A-1 uttered the words "You are the person who killed my brother. Hence, you should be finished off." So saying, A-1 attacked the deceased on the head with an aruval, and the other accused attacked him indiscriminately. In that course, P.W.2 intervened, and A-1 attacked him. A-3 and A-4 also attacked P.W.2. Immediately, P.W.2 ran for a short distance and fell

down. Not satisfied with that, A-1 followed P.W.2 and also attacked him. On hearing the distressing cry, a crowd gathered. Immediately, the accused fled away from the place of occurrence. P.W.1 took the injured, P.W.2, and the deceased to the Government Hospital, Erode, where the deceased was declared dead. An intimation, Ex.P17, regarding the death of Christian, was given to the Out-Post Police Station, where P.W.8 was the Head Constable. P.W.8 in turn went over to the Government Hospital and recorded the statement of P.W.1, which is marked as Ex.P1. Then, he forwarded Ex.P1, the complaint, along with Ex.P17, the intimation, to Erode Town Police Station, where P.W.9 was the Head Constable. On the strength of Ex.P1, the complaint, P.W.12, the Sub Inspector of Police, attached to the respondent Police Station, registered a case in Crime No.1292 of 1993 under Sections 147, 148, 341, 302 and 307 of I.P.C. The express First Information Report, Ex.P19, was despatched to the Court.

(b) P.W.6, the Medical Officer, examined P.W.2 medically and issued a wound certificate, Ex.P12.

(c) On receipt of the copy of the FIR, P.W.15, the Inspector of Police, took up investigation, proceeded to the scene of occurrence and prepared an observation mahazar, Ex.P4, and a rough sketch, Ex.P22. Following the same, he recovered the bloodstained earth, M.O.5, and sample earth, M.O.6, under a cover of mahazar, Ex.P5. He also proceeded to the Government Hospital and examined P.W.2, who was injured and under treatment. He further conducted inquest on the dead body of Christian in the presence of witnesses and panchayatdars and prepared Ex.P23, the inquest report. Then, the Investigating Officer gave a requisition, Ex.P2, to the hospital authorities for conduct of autopsy.

(d) P.W.4, the Civil Assistant Surgeon, attached to the Government Hospital, Erode, on receipt of the said requisition, conducted autopsy on the dead body of Christian and found 24 injuries. The Doctor has issued Ex.P3, the postmortem certificate with his opinion that the deceased would appear to have died of shock and haemorrhage due to the multiple injuries about 12 to 16 hours prior to autopsy.

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(e) Pending investigation, A-5 was arrested on 3.7.1993. He gave a confessional statement which was recorded by the Investigator. The admissible part is marked as Ex.P8, pursuant to which M.O.3, aruval, was recovered under a cover of mahazar. A-5 was sent for judicial remand. Following the same, A-7 was arrested on 30.7.1993. He gave a confessional statement. The admissible part of the same is marked as Ex.P10. Pursuant to the same, M.O.4, aruval, produced by him, was recovered under a cover of mahazar. Following the requisition given by the Investigator, the statement of P.W.1 was recorded by the Judicial Magistrate, P.W.13, under Sec.164 of Cr.P.C. All the material objects recovered from the place of occurrence and from the dead body, and also the weapons of crime recovered from the accused, were subjected to chemical analysis, which resulted in two reports namely Ex.P15, the Chemical Analyst's report, and Ex.P16, the Serologist's report. On completion of investigation, the Investigator filed the final report.

4.The case was committed to Court of Session, and necessary charges were framed. After the framing of the charges, two of the accused namely A-2 and A-3 died, and one of the accused namely A-8, was absconding. Hence, the case was proceeded against five persons. In order to substantiate the charges, the prosecution marched 15 witnesses and also relied on 23 exhibits and 12 material objects. On completion of evidence on the side of the prosecution, the accused were questioned under Sec.313 of Cr.P.C. as to the incriminating circumstances found in the evidence of the prosecution witnesses, which they flatly denied as false. On the side of defence, two witnesses were examined, and Exs.D1 to D3 were marked. The learned trial Judge heard the arguments advanced on either side. After doing so, the trial Court took the view that the prosecution has proved the case beyond reasonable doubt, found the appellants/A-1, A-4 and A-6 guilty and awarded the punishment as referred to above, while it has acquitted A-5 and A-7 of all the charges levelled against them. Hence, this appeal at the instance of the appellants before this Court.

5.Arguing for the appellants, the learned Senior Counsel would submit that in the instant case, the lower Court should have acquitted the appellants/accused since there was not only lack of evidence, but also bereft of evidence. The learned Senior Counsel would urge that in the instant case, the prosecution rested its case on the direct evidence by examining P.Ws.1 to 3, out of whom P.Ws.1 and 3 remained hostile, and thus, what was available for the prosecution was the evidence of P.W.2.

6.The learned Counsel would further submit that P.W.2 was the elder brother of the deceased, and thus, his evidence has got to be carefully examined; that if this test is applied, then, his evidence should have been rejected; that P.W.1 at the first instance in the chief-examination would speak to the fact that there was no light at the time of the occurrence; that he would further add that there were four persons, and he could not identify the other four persons; that it is pertinent to point

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out that the lower Court should have looked into the theory of alibi put forth by the defence; that the whole motive was attributed to A-1; that he has been shown as prime accused in the case; that the evidence of P.W.2 would go to show that it was A-1 who uttered those words, following which the other accused have acted at the time of the occurrence; that when the prosecution came forward with such a theory, the defence put forth the plea of alibi; that in order to prove the same, D.Ws.1 and 2, who were the Assistant and the Doctor respectively, attached to the Government Hospital, Kulithurai, were examined, through whom Exs.D1 to D3 were marked; that a perusal of Exs.D1 to D3 would go to show that from 19.6.1993 to 22.6.1993, A-1 was actually admitted in the hospital for treatment; that it is also pertinent to point out that the Investigator has admitted that at the time

of investigation, he came to know that A-1 was admitted in the hospital, and he also got the certified copy of the case sheet pertaining to A-1; but, the Investigating Agency has not produced the same before the Court for the reasons best known to them; that under the circumstances, it would be abundantly clear that A-1 was actually in the hospital at that time; and that this fact would be suffice to reject the evidence of P.W.2, who, according to the prosecution, is an eyewitness.

7.Added further the learned Senior Counsel that in the instant case, the prime accused A-1 was shown to have been arrested at a later point of time; that when the Investigator came forward to speak about the fact that between 19.6.1993 and 22.6.1993, A-1 was available in the hospital, there could not have been any impediment for arresting A-1; but, he did not do so, and thus, the arrest, the alleged confession and the pursuant recovery of weapon of crime were all falsehood and introduced to suit the prosecution case; that under the circumstances, the lower Court should have rejected the prosecution case outright and acquitted the appellants in toto, and hence, they are entitled for an acquittal in the hands of this Court.

8.The Court heard the learned Additional Public Prosecutor on the above contentions and paid its anxious consideration on the submissions made.

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9.It is not a fact in controversy that one Christian, the brother of P.W.2, was done to death in an incident that took place at about 9.30 P.M. on the date of occurrence namely 20.6.1993. Following the inquest made by the Investigator, the dead body was subjected to postmortem by P.W.4, the Doctor, who gave a certificate, wherein he has opined that the deceased died out of shock and haemorrhage. Apart from that, this fact that the deceased died out of homicidal violence was never questioned by the appellants/accused at any stage of the proceedings. Hence, it could be safely recorded so.

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10.In order to establish the accusations made against the accused, the prosecution rested its case on the direct evidence by examining P.Ws.1 to 3. Out of them, P.Ws.1 and 3 have turned

hostile. Thus, what was available for the prosecution was the solitary and uncorroborated testimony of P.W.2. P.W.2 is also shown to be the elder brother of the deceased. Needless to say that in a given case like this, though there is solitary and uncorroborated evidence of a related witness, the same need not be discarded; but, it must be subjected to test of careful scrutiny. If that test is applied in the instant case on the evidence of P.W.2, this Court is afraid whether it could accept such evidence. In the instant case, even according to P.W.1, there was no light available at that time. In the F.I.R., 8 named persons have been mentioned, against whom charge sheet was filed. It remains to be stated that the evidence of P.W.1 would go to show that only four persons were known to him, and the other four persons were not known to him. If to be so, there was no occasion for him to name eight persons at the time when he gave information. Further to add the situation, according to P.W.2, at the time of occurrence, it was A-1 who uttered "You are the person who killed my brother. Hence, you should be finished off." P.W.2 would further say that A-1 was available at the time and place of occurrence to commit the offence. But, at the same time, the defence was able to show that A-1 was available in the Government Hospital, Kulithurai, between 19.6.1993 and 22.6.1993. The documentary evidence was shown by the defence in that regard. Apart from that, D.Ws.1 and 2 have been examined. The lower Court has rejected those evidence stating that D.Ws.1 and 2 could not identify A-1 since only the name is mentioned in the O.P. chit, and the case sheet has not been filed before the Court. Now, at this juncture, it has to be pointed out that the Investigator has candidly admitted that he obtained the certified copy of the case sheet pertaining to A-1 for his admission and taking treatment between 19.6.1993 and 22.6.1993 before the Government Hospital, Kulithurai, and he has not produced the same. If to be correct, then the prosecution should have placed the entire material before the Court, but not done so. Thus, the evidence put forth by the defence through D.Ws.1 and 2 and the documentary evidence coupled with the evidence of the Investigator that he received the certified copy of the document would be suffice to find that A-1 was present at the Government Hospital during the relevant time for taking treatment, and he was not present at the time and place of occurrence as urged by the prosecution. If to be so, the theory of alibi should have been accepted. If the evidence of P.W.2 is viewed from this point of view, it would be quite unsafe to accept his evidence to sustain a conviction. In such circumstances, the Court has to accept the defence plea, and the appellants/A-1, A-4 and A-6 are entitled for acquittal, giving the benefit of doubt. Thus, it can be well stated that the prosecution has miserably failed to prove the case beyond reasonable doubt. Therefore, the judgment of conviction and sentence passed by the lower Court, has got to be set aside.

11.In the result, both these criminal appeals are allowed, setting aside the judgment of conviction and sentence passed by the Court below. The appellants/A-1, A-4 and A-6 are acquitted of all the charges levelled against them. The bail bonds executed by A-1 and A-4, shall stand terminated. It is stated that the

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appellant/A-6 in C.A.No.634 of 2004 is in jail. Hence, A-6 is directed to be set at liberty forthwith unless his presence is required in any other case. The fine amounts, if any paid by them, shall be refunded to them.

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To;

1)The Principal Sessions Judge, Erode.
2)The Judicial Magistrate No.II, Erode.
3)The Judicial Magistrate No.II, Erode,
Through The Chief Judicial Magistrate, Erode.
4)The Judicial Magistrate, NO. I Thiruvannamalai.
5)The Judicial Magistrate, No. I Thiruvannamalai,
Through The Chief Judicial Magistrate, Tiruvannamalai.
6)The District Collector, Erode/Coimbatore
7)The Director General of Police, Chennai.
8)The Public Prosecutor, Chennai.
9)The Superintendent, Central Prison, Coimbatore.
10) The Inspector of Police, Erode Town Police Station, Erode District

+ one cc to Mr. C.S. Dhanasekaran, Advocate sr no. 50185
+ one cc to Mr. M.M. Sundaresh, Advocate sr no. 50000

NG(CO)
NM(04.11.2006)

C.A.Nos.634 and 645
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